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San Rafael Healthcare Wellness, LLC

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD – REGION 20

SAN RAFAEL HEALTHCARE AND WELLNESS, LLC and NATIONAL UNION OF HEALTHCARE WORKERS	NLRB Case No.: 20-CA-204948

RESPONDENT'S BRIEF SUPPORTING EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Respondent San Rafael Healthcare Wellness, LLC ("Employer" or "Respondent"), by its attorneys Epstein Becker Green, P.C. and pursuant to Section 102.46 of the National Labor Relations Board's ("Board" or "NLRB") Rules and Regulations, hereby excepts to Administrative Law Judge Jeffrey D. Wedekind's ("ALJ") Decision in Case No. 20-CA-204948 issued on February 14, 2018 ("Decision"). Respondent files Respondent's Exceptions to the ALJ's Decision concurrently and together with Respondent's Brief in Support of Its Exceptions (collectively "Exceptions"). As described below, Respondent respectfully excepts to the ruling, findings, the legal standards applied and conclusions in the ALJ's Decision that Respondent's Alternative Dispute Resolution Policy ("ADR Policy") can be reasonably interpreted to restrict employees' protected Section 7 rights, his failure to find that the legitimate business justifications of Respondent's ADR Policy outweigh any potential impact on such rights, and his finding that the ADR Policy violates Section 8(a)(1) of the National Labor Relations Act ("Act").

I. PROCEDURAL HISTORY.

On August 22, 2017, the National Union of Healthcare Workers ("Charging Party") filed an unfair labor practice charge ("Charge"), alleging that Respondent's work rules unlawfully interfere with employees' Section 7 rights. Jt.[1] Ex. 1 and 5; S.F. 1(a)-(b). On October 23, 2017, the Regional Director of Region 20 issued a Complaint and Notice of Hearing ("Complaint"). Jt. Ex. 3, Complaint. The Complaint alleged that Respondent's Alternative Dispute Resolution Policy ("ADR Policy" or "Policy") violates Section 8(a)(1) of the National Labor Relations Act ("Act") because it "would reasonably be read by employees to prohibit or restrict them from filing unfair labor practice charges with the Board." Jt. Ex. 3, Complaint, ¶¶ 5-6. On November 6, 2017, Respondent answered the Complaint, denying the substantive allegations that its ADR policy violated the Act. Jt. Ex. 4, Answer to Complaint, ¶¶ 5-6.

On November 9, 2017, Charging Party filed an Amended Charge that maintained the allegation that Respondent's ADR Policy violated employees' Section 7 rights. Jt. Ex. 5,

[1] Throughout this Brief, "Jt. Ex." shall refer to the parties' Joint Exhibits and "S.F." shall refer to the Stipulation of Facts contained in the parties' Joint Motion To Submit Case on a Stipulated Record; "RBM" shall refer to Respondent's Brief on the Merits; "ALJD" shall refer to Administrative Law Judge Jeffrey Wedekind's Decision in NLRB Case No. 20-CA-204948.

Amended Charge. On November 20, 2017, the Regional Director issued an Amended Complaint that reasserted the allegation that Respondent's ADR Policy "would reasonably be read by employees to prohibit or restrict them from filing unfair labor practice charges with the Board." Jt. Ex. 7, Amended Complaint, ¶¶ 5-6. On November 28, 2017, Respondent filed an Amended Answer, again unequivocally denying that its ADR Policy violates the Act. Jt. Ex. 8, Amended Answer.

On November 29, 2017, the parties submitted a Joint Motion to Submit Stipulated Record ("Joint Motion"). The Stipulated Record was entered into by the parties based on the then current status of the law under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), and *U-Haul of California*, 347 NLRB 375 (2006), and before these decisions and their progeny were expressly or effectively overruled by *The Boeing Co.*, 365 NLRB No. 154 (2017) ("*Boeing*").

On November 30, 2017, the Associate Chief Administrative Law Judge granted the Joint Motion and ordered the parties to file briefs on the merits of the case by the close of business on Thursday, January 4, 2018. On December 28, 2018, Respondent filed a Motion to Extend Time to File Briefs on the Merits. On December 29, 2017, the Associate Chief Administrative Law Judge granted Respondent's motion and extended the time to file briefs on the merits to January 22, 2018. On January 22, 2018, the Associate Chief Administrative Law Judge issued an Order Revising Briefing Schedule Due to Government Shutdown ("Order"). Pursuant to this Order, the deadline to file briefs on the merits was extended to January 25, 2018.

On February 14, 2018, the ALJ issued his Decision, finding that the ADR Policy violated Section 8(a)(1). The case was transferred to the Board on February 14, 2018, and the deadline to file exceptions and a brief in support of exceptions was set for March 14, 2018.

II. FACTUAL SUMMARY.[2]

Since at least November 6, 2016, Respondent has maintained the ADR Policy, which provides, in relevant part:

> In any organization, employment disputes will arise, sometimes requiring resolution through a formal proceeding. Traditionally, this proceeding has been conducted through our court system. However, ***our court system too often has proven to be an exceedingly costly and time consuming process***, thus failing to provide the parties involved with an acceptable resolution of the dispute.
>
> ***With this in mind, your employer has developed and implemented this Alternative Dispute Resolution Policy ("ADR Policy").*** We believe that the procedures set forth in this ADR Policy will result in a fair and equitable means for resolving those types of employment disputes that all too often become unnecessarily protracted. These procedures ensure that all parties have an opportunity to meet and see if there is a mutually satisfactory basis for resolving their dispute. Failing to reach an amicable resolution, these procedures provide for a fair hearing before an impartial, objective individual who has been selected by both sides. The neutral arbitrator will have the full authority to resolve this matter protecting the rights of all parties.
>
> We hope that you will never find the need to utilize these procedures and that your employment will be free of major disputes or issues. However, in the event a dispute should arise, these procedures are there to ensure that the dispute is handled fairly and efficiently.
>
> **WHO IS COVERED BY THE ADR POLICY**
>
> The ADR Policy will be mandatory for ALL DISPUTES ARISING BETWEEN EMPLOYEES, ON THE ONE HAND, AND YOUR EMPLOYER. [*sic*] AND/OR ITS EMPLOYEES AND OFFICERS (HEREINAFTER COLLECTIVELY THE COMPANY, ON THE OTHER HAND. Any disputes which arise

[2] The facts recited are limited to those in the Stipulated Record. There are other relevant facts, however, as the ALJ did not grant or even rule on Respondent's request to open the record in light of *Boeing*, a complete factual record applicable to the current state of the law has not yet been developed.

and which are covered by the ADR Policy must be submitted to final and binding resolution through the procedures of the Company's ADR Policy.

For parties covered by this Alternative Dispute Resolution Policy, alternative dispute resolution, including final and binding arbitration, is the exclusive means for resolving covered disputes (as defined below); no other action may be brought in court or in any other forum. ***This agreement is a waiver of all rights to a civil court action for a covered dispute; only an arbitrator, not a Judge or Jury, will decide a dispute.***

COVERED DISPUTES

Nothing in this Alternative Dispute Resolution Policy is intended to require arbitration of any claim or dispute which the courts of this jurisdiction have expressly held are not subject to mandatory arbitration....

Covered disputes include any dispute arising out of or related to my employment, the terms and conditions of my employment and/or the termination of your employment, including, but not limited to, the following:

- Alleged violations of federal, state and/or local constitutions, statutes or regulations;
- Claims of unlawful harassment, discrimination, retaliation or wrongful termination that ***cannot be resolved*** by the parties or ***during an investigation by an administrative agency*** (such as the Equal Employment Opportunity Commission); Covered claims include, but are not limited to, claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Equal Pay Act, and any other statutory scheme covering claims of discrimination or harassment on the basis of race, color, age, religious creed, national origin, ancestry, disability, sexual orientation, gender identity, sex or any other characteristic protected by law...

If you, or the Company, ***file a lawsuit in court*** involving both claims that are subject to arbitration in accordance with this ADR Policy as well as claims that are not subject to arbitration, the court

will stay, or place on hold, any litigation of the claims in the case that are not subject to arbitration and require arbitration of the claims that are subject to arbitration proceed before any litigation in court of claims that are not subject to arbitration…

CLASS ACTION WAIVER

I understand and agree this ADR program prohibits me from joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claims of others. Under this Policy, no arbitrator shall have the authority to order any such class action or representative action.

SEVERABILITY

In the event that any provision of this ADR Policy is determined by a court of competent jurisdiction to be illegal, invalid or unenforceable to any extent, such term or provision shall be enforced to the extent permissible under the law and all remaining terms and provisions of this ADR Policy shall continue in full force and effect.

Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with the Equal Employment Opportunity Commission, the National Labor Relations Board or any similar federal or state agency seeking administrative resolution. However, any claim that cannot be resolved through administrative proceedings shall be subject to the procedures of this ADR Policy.

Jt. Ex. 7, Amended Complaint, Ex. A; S.F. 5 (emphasis added).

The Policy expressly and clearly is applicable only to civil litigation filed in state or federal courts. Moreover, at multiple points throughout the Policy, the plain, unambiguous language makes clear that it does *not* apply to claims filed with administrative agencies like the Board and in fact expressly does *not* limit the filing of charges with the NLRB. Jt. Ex. 7, Amended Complaint, Ex. A.

First, the preamble specifically states that Respondent promulgated the ADR Policy to avoid the issues inherent in traditional court litigation. Jt. Ex. 7, Amended Complaint, Ex. A. After explaining that employment disputes have "traditionally…been conducted through our

court system," the first two paragraphs summarize the problems with traditional state and federal court litigation: "our court system too often has proven to be an exceedingly costly and time consuming process, thus failing to provide the parties involved with an acceptable resolution of the dispute." *Id.* The Policy continues, "***With this in mind***, your employer has developed and implemented this Alternative Dispute Resolution Policy ("ADR Policy")." *Id.*

Second, when detailing the types of covered claims, the Policy states, "Claims of unlawful harassment, discrimination, retaliation or wrongful termination that ***cannot be resolved by the parties or during an investigation by an administrative agency***..." Jt. Ex. 7, Amended Complaint, Ex. A (emphasis added). By only including claims that ***cannot*** be resolved "during an investigation by an administrative agency" in the "Covered Claims," the Policy necessarily exempts claims that ***can*** potentially be resolved by administrative agencies, such as unfair labor practices. *Id.* Then, at the end of the "Covered Claims" section, the Policy describes what will happen if an employee files "a lawsuit in court" that involves both arbitral and non-arbitral claims. *Id.* This section says nothing about filing claims with the Board or other administrative agencies. *Id.* This conspicuous and purposeful omission conveys that only arbitral claims raised in a lawsuit in state or federal court are subject to the Policy's requirements.

Finally, to eliminate any possible confusion, the ADR Policy expressly exempts unfair labor practice charges filed with the Board, noting:

> ***Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with...the National Labor Relations Board.***

Jt. Ex. 7, Amended Complaint, Ex. A (emphasis added). This exclusion appears in a standalone paragraph at the end of the Policy, thereby signaling that any language proceeding it does not impact employees' rights to file unfair labor practice charges. *Id.* This explicit and unambiguous exclusion is followed by another disclaimer that reiterates only claims that "cannot be resolved through administrative proceedings" are subject to the Policy. *Id.* Thus, contextually construing the Policy as a whole, it clearly and unequivocally immunizes unfair labor practice charges filed with the Board from the ADR mandate.

III. ISSUES PRESENTED.

1. Did *Boeing* overrule *U-Haul of California*, 347 NLRB 375 (2006) and its progeny, which expressly analyzed the lawfulness of mandatory arbitration policies under the reasonably construe standard? (Exception Numbers 4, 7-10)

2. Does the ADR Policy, when reasonably interpreted, prohibit employees from filing unfair labor practice charges with the National Labor Relations Board? (Exception Numbers 1-12, 15)

3. Can an arbitration policy that expressly excludes unfair labor practice charges filed with the Board from its arbitration mandate be reasonably interpreted under *Boeing* to prohibit employees from filing unfair labor practice charges with the National Labor Relations Board? (Exception Numbers 1-12, 15)

4. Do the legitimate business justifications underlying the ADR Policy outweigh the nature and extent of any potential impact on protected activity? (Exception Numbers 13-15)

5. Did the ALJ err in not considering or ruling on Respondent's request to reopen the record to receive evidence relevant to the new *Boeing* standard, which was retroactively implemented after the parties agreed to submit the case on a stipulated record? (Exception Number 16)

IV. ANALYSIS.

A. *Boeing* Replaced The Arbitrary, Singularly-Focused "Reasonably Construe" Standard With A Balancing Test That Better Effectuates The Goals Of The Act And The Function Of The Board.

The United States Supreme Court has repeatedly held that the Board is tasked with "applying the general provisions of the Act to the complexities of industrial life," with the ultimate goal of striking an appropriate balance between employees' Section 7 rights and employers' business interests, both of which are "essential elements in a balanced society." *Boeing*, NLRB No. 154, slip op. at 2, 7. Prior to *Lutheran Heritage*, the Board followed the Supreme Court's edict and explicitly balanced these interests when evaluating the lawfulness of facially neutral rules. *Id.*, slip. op. at 7-8 (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)); *see also Lafayette Park Hotel*, 326 NLRB 824, 829-830 (1998).

However, the advent of *Lutheran Heritage*'s "reasonable construe" standard imposed a "single-minded consideration" of Section 7 rights that unduly prevented the Board "from giving meaningful consideration to the real-world 'complexities' associated with many employment policies, work rules and handbook provisions." *Boeing*, 365 NLRB No. 154, slip op. at 2. The "reasonably construe" standard not only contradicted controlling Supreme Court precedent and dramatically departed from the Board's prior decisions, but it also restricted the Board's ability to make nuanced distinctions between different protected rights, different business justifications, and different degrees of intrusion, instead supplanting the Board's informed discretion with a "one-size-fit-all" approach that treated all intrusions the same no matter how slight and all rules the same no matter how important the underlying business justification. *Id.*, slip op. at 10-11. In the ensuing years, the "reasonably construe" test proved to be an unworkable standard that "defied all reasonable efforts to apply and explain it" and produced arbitrary results without principled distinctions. *Id.*, slip op. at 11-13.

To rectify these problems, the Board in *Boeing* overturned *Lutheran Heritage*'s "reasonably construe" standard and replaced it with a balancing test that restored the Board's ability to differentiate between different types of protected activities, different types of business interests, and different degrees of intrusion so it can "strike the proper balance" between these interests. *Boeing*, 365 NLRB No. 154, slip op. at 14 (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)). Under the *Boeing* test, where a facially neutral policy, when reasonably interpreted, potentially impacts protected activity, it is nevertheless lawful if the nature and extent of the potential impact on NLRA rights is outweighed by the legitimate business justifications for the policy. *Boeing*, 365 NLRB No. 154, slip op. at 3. When balancing the potential impact on protected rights against the legitimate business justifications, "the Board must recognize those instances where the risk of intruding on NLRA rights is comparatively slight," and the Board "may distinguish between substantial justifications – those that have direct, immediate relevance to employees or the business – and others that might be regarded as having more peripheral importance." *Id.*, slip op. at 15.

Pursuant to the *Boeing* balancing test, the Board delineated three categories of workplace rules and policies. *Boeing*, 365 NLRB No. 154, slip op. at 15. Category 1 comprises rules that are per se lawful either because (1) when reasonably interpreted, they do not prohibit or interfere with protected rights or (2) the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule. *Id.* Category 2 includes rules that warrant individual scrutiny on a case-by-case basis to determine whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights and, if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications. *Id.* Finally, Category 3 encompasses rules that are unlawful to maintain because they prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. *Id.*

Under the *Boeing* test, the ADR Policy does not unlawfully chill employees' Section 7 rights because it could not be reasonably interpreted as a prohibition on filing Board charges. Even if it could – despite the plain and unambiguous language squarely contradicting such an interpretation – the business justifications[3] underlying the Policy clearly outweigh its minimal, if any, impact on protected rights.

B. *Boeing* Rendered *U-Haul* And Other Related Pre-*Boeing* Cases Invalid.

Beginning with *U-Haul of California*, 347 NLRB 375, 377-378 (2006), a line of cases arose under *Lutheran Heritage* that applied the now disregarded "reasonably construe" analysis to mandatory arbitration policies. *U-Haul*, 347 NLRB at 377 ("Applying [the reasonably construe] standard here, we find the arbitration policy is unlawful."); *see also, e.g., Lincoln Eastern*, 364 NLRB No. 16, slip op. at 2 (2016) ("[A]pplying the test of *Lutheran Heritage*...we find that the Respondent's arbitration policy violates Section 8(a)(1)); *SolarCity Corporation*, 363 NLRB No. 83, slip op. at 4 (2015) ("We analyze the legal issue here under the *Lutheran Heritage* test...); *Ralph's Grocery Company*, 363 NLRB No. 128 (2016); *Bloomingdale's, Inc.*,

[3] Again, although the ADR Policy itself and the limited record contain overwhelmingly legitimate business justifications, we note, had Respondent's request to reopen the record been granted, more detailed and specific business justifications would have been established in the record.

363 NLRB No. 172 (2016); *Securitas Security Services USA, Inc.*, 363 NLRB No. 182 (2016) ("The Board applies its *Lutheran Heritage Village Livonia* test to determine whether employees would reasonable believe that arbitration policies interfere with their ability to file a Board charge..."); *ISS Facility*, 363 NLRB No. 160, slip op. at 2 (2016) ("The Board applies its *Lutheran Heritage Village-Livonia* test to determine whether a reasonable employee would construe the [arbitration policy] to prohibit the filing of Board charges...").

The ALJ erroneously found *Boeing* neither overturned these line of cases, nor necessitates a different result. Although the Board did not reevaluate the legality of mandatory arbitration policies under *Boeing*, it absolutely overruled any case that utilized the reasonably construe standard to analyze the lawfulness of such policies. *Boeing* requires a nuanced balancing of the policy's legitimate business justifications against the nature and extent of its potential impact on protected rights. None of the cases that assessed the lawfulness of mandatory arbitration policies under *Lutheran Heritage* did this. Rather, they relied exclusively on the reasonably construe standard, which *Boeing* overturned. Accordingly, these cases are no longer valid precedent under *Boeing*.

While it is true that certain policies deemed unlawful under *Lutheran Heritage* may also be deemed unlawful under *Boeing*, a fact-specific, balancing of interests analysis must be conducted before such a determination can be made. Simply relying on overturned precedent, as the ALJ did here, does not suffice. As detailed below, and contrary to the ALJ's unsubstantiated conclusion, *Boeing* does require a different result than *U-Haul* and its progeny, both as to whether arbitration policies with an explicit, plain English exclusion for Board charges can be reasonably interpreted as an intrusion on protected rights and, assuming they could, whether the legitimate business justifications outweigh the potential intrusion. Accordingly, the Employer respectfully requests the Board grant its Exceptions Numbers 4 and 7 to 10 and reverse the ALJ's Decision and Order as it improperly relied on invalid Board precedent.

C. The ADR Policy Cannot Be Reasonably Interpreted As A Prohibition On Filing Board Charges.

The ADR Policy, when reasonably interpreted, does not restrict protected rights. Under *Boeing*, a facially neutral policy must first be reasonably interpreted to determine whether it would potentially interfere with Section 7 rights. *Boeing*, 365 NLRB No. 154, slip op. at 3. If it cannot be reasonably interpreted as a prohibition on protected rights, then it is a Category 1, presumptively lawful policy. *Id.* Even if it can, then the Board conducts the balancing test. *Id.*

When reasonably interpreting a policy, particular phrases cannot be isolated and construed in a vacuum. *Lafayette Park Hotel*, 326 NLRB at 829-830 (1998); *Lutheran Heritage*, 343 NLRB 646, 646 (2004).[4] Rather, a reasonable interpretation entails a meaningful contextual analysis that not only assesses the challenged language in relation to the policy as a whole, but avoids any presumption of unlawful interference with employee rights or the application of speculative meanings or definitions that differ from the obvious intent of the plain and unambiguous language. *Lafayette Park Hotel*, 326 NLRB at 825-826; *Tradesmen International*, 338 NLRB 460, 461-462 (2002); *Lutheran Heritage*, 343 NLRB at 647.

Notably, the cases arising under *U-Haul* lost sight of these basic interpretive guidelines and interpreted provisions in isolation from their contextual limitations, employing fanciful hypotheticals and far-fetched speculation wholly untethered to the actual evidence to find that policies with express exemptions for the filing of Board charges prohibited such action. As federal courts and former Chairman Miscimarra have pointed out, it is patently *unreasonable* to interpret a policy as prohibiting Board charge filings when the policy says the exact opposite. *See Solar City*, 363 NLRB No. 83, slip op. at 10 (2015) (Member Miscimarra dissenting); *see also Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1020 (2015). To reach such a conclusion assumes the employee either does not understand basic English or did not read the entire policy. An interpretation based on such assumptions is not reasonable. Accordingly, any cases that have

[4] Although *Boeing* overruled *Lutheran Heritage*'s "reasonably construe" test, the principles of interpretation articulated by the Board in *Lutheran Heritage* and its progeny are ordinary, well-established rules of construction relied upon by the Board long before the advent of the "reasonably construe" standard and remain salient to the reasonable interpretation prong of the *Boeing* test. *See, e.g.*, *Lafayette Park Hotel*, 326 NLRB 824, 825-827 (1998).

found plain English exclusions for filing Board charges could be reasonably interpreted as prohibiting such filings should be overruled.

1. The ADR Policy Expressly Exempts Board Charges From Its Arbitration Mandate.

The ADR Policy cannot be reasonably interpreted to prohibit the filing of Board charges because it expressly exempts Board charges from its arbitration mandate. The ADR Policy states, "**Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with...the National Labor Relations Board**..." Jt. Ex. 7, Amended Complaint, Ex. A, p. 3. This explicit exclusion contains no caveats, it is drafted in plain English in a manner even the most unsophisticated lay person can understand, and it is the first sentence in a standalone paragraph dedicated solely to describing the types of claims exempt from the Policy. *Id.* Moreover, this exemption's strategic placement in a standalone paragraph clearly conveys that none of the preceding provisions restricts the right to file Board charges. *Id.* The import of this unambiguous exclusion is further bolstered by the only other sentence in the paragraph, which reiterates that only claims that "cannot be resolved by administrative proceedings" are subject to the Policy's mandates. *Id.* Such a class obviously excludes unfair labor practice charges, which are unquestionably amenable to resolution by administrative Board proceedings.

"Every employee who reads English would understand the [ADR Policy has] no impact on NRLB charge-filing, since this is precisely what the [policy] says." *Solar City*, 363 NLRB No. 83, slip op. at 10 (2015) (Member Miscimarra dissenting). "This language eliminates any possible uncertainty about the right of employees to file charges with the Board." *Lincoln Eastern*, 364 NLRB No. 16, slip. op. at 6 (Member Miscimarra dissenting). Thus, the only reasonable interpretation of a policy that explicitly exempts the filing of Board charges from its purview is that such filings are not prohibited. Consequently, the ADR Policy is lawful, and the Employer respectfully requests the Board grant its Exceptions Numbers 1 to 12 and 15 and reverse the ALJ's Decision and Order.

2. The ALJ Improperly Misconstrued A Few Isolated Provisions In The Policy To Interpret The Policy As a Prohibition On Board Charges.

The ALJ relied on three isolated aspects of the policy taken out of context to construct an interpretation that proscribes the filing of Board charges: (1) the "Who is Covered by the ADR Policy" and "Covered Disputes" sections broadly require all employment-related disputes to be arbitrated without qualification, (2) the "Class Action Waiver" section precludes collective actions, which facially encompasses Board charges, and (3) the exemption's placement, font and section heading do not sufficiently set it apart from other provisions. (ALJD, 5:1-18). When properly interpreted in context, however, none of these grounds overcome the categorical exemption for Board charges.

(a) The Coverage Clauses Do Not Preclude Employees From Filing Board Charges.

The ALJ's flawed finding that the Policy's coverage clauses could be reasonably interpreted to preclude the filing of Board charges, notwithstanding the unequivocal exemption for Board charges, contravenes established interpretative principles and misconstrues the fundamental nature of the Board's processes.

(i) The ALJ Construed These Clauses In Isolation And Out Of Context.

Although the coverage clauses set forth in the "Who is Covered by the ADR Policy" and the "Covered Disputes" sections broadly encompass all employment-related disputes, including violations of federal law, a *reasonable* interpretation requires that these provisions to be harmonized with explicit exclusion for Board charges. To interpret these provisions as prohibiting Board charges despite explicit language to the contrary improperly construes them in a vacuum completely divorced from the inextricable limitations imposed by the exemption, effectively nullifying this exclusionary language. The Board has long rejected such an incomplete and inaccurate theory. *Lafayette Park Hotel*, 326 NLRB at 825-826, 829-830; *Lutheran Heritage*, 343 NLRB at 646. Rather, a reasonable interpretation necessitates a meaningful contextual analysis that avoids superfluous language and achieves an integrated synthesis that confers force and effect on all provisions. Thus, when two provisions lend

themselves to different interpretations – one which would render them inconsistent and the other which would reconcile them – reasonableness mandates the latter be adopted. Here, the ALJ erroneously adopted the construction that deemed the exemption and the coverage clauses inconsistent and nullified the exemption. (ALJD, 5:1-18). However, a *reasonable* interpretation requires them to be harmonized and read the exemption as an exception to the coverage clauses.

Consequently, the ALJ's finding that the coverage language supports a violation of the Act is not supported by law or fact and must be reversed, and the Board should grant the Employer's Exception Numbers 1 to 12 and 15.

(ii) The Policy's Prohibition On Claims Brought In Court Does Not Interfere With Board's Ability To Prosecute Unfair Labor Practice Charges.

The ALJ further reasons that a prohibition on court litigation interferes with prosecution of unfair labor practice charges because such charges "are not always finally resolved at the administrative agency level, but often end up before a federal court of appeals for review and enforcement of a Board decision." (ALJD, 5:38-6:2). This construction not only improperly isolates this provision from the contextual elucidation provided by the exclusion for Board charges, but also misconstrues the nature of Board proceedings. The ADR Policy only applies to disputes between Respondent and its employees. Jt. Ex. 7, Amended Complaint, Ex. A. Cases before the Board, and cases before a federal court of appeals for review and enforcement of a Board decision, are between the NLRB and the adverse party, ***not the individual employee who filed the initial Board charge***. The ADR Policy specifically preserves employees' rights to file Board charges, so the prohibition on court litigation *between Respondent and its employees* does not interfere with the Board's processes. Accordingly, the ALJ's reasoning is fundamentally flawed and Exception Numbers 1 to 12 and 15 should be granted and the ALJ's Decision and Order should be reversed.

(iii) Mandating Arbitration Of NLRA Claims Does Not Render The ADR Policy Unlawful .

Even assuming the ADR Policy mandates arbitration of NLRA claims, which it expressly does not, this does not violate the Act or preclude employees from filing Board charges. Parties

may lawfully agree to arbitrate NLRA claims, whether through a collective bargaining agreement or a general arbitration policy, provided the agreement does not otherwise interfere with the filing of Board charges. *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 258 (2009); *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip. op. at 32 (2014); *see also Lincoln Eastern*, 364 NLRB No. 16, slip op. at 6 (Member Miscimarra dissenting). An arbitration agreement does not unlawfully proscribe the filing of Board charges when it expressly states employees categorically retain the right to do so. *See, e.g., Lincoln Eastern*, 364 NLRB No. 16, slip op. at 6 (Member Miscimarra dissenting). Accordingly, a bilateral agreement to arbitrate NLRA claims that altogether excludes Board charge filings neither renders a policy unlawful nor interferes with employees' rights to file Board charges.

Consequently, the ALJ's finding that the coverage language supports a violation of the Act is not supported by law or fact and must be reversed, and the Board should grant the Employer's Exception Numbers 1 to 12 and 15.

(b) The Class Waiver Provision Does Not Preclude Employees From Filing Board Charges.

Like the ALJ's reliance on the coverage clauses, his reliance on the "Class Action Waiver" section to find a prohibition on Board charges violates established interpretative principles. (ALJD, 5:9-13). The exclusion for Board charges states that "Nothing in the Alternative Dispute Policy precludes any employee from filing a charge with the…National Labor Relations Board…" Jt. Ex. 7, Amended Complaint, Ex. A. This necessary includes any Board charges seeking to vindicate a collective claim. Any contrary construction can only be achieved by isolating the class waiver from its context, construing it in a vacuum, and adopting an interpretation that renders the exclusion for Board charges superfluous. That is not a reasonable interpretation.

Consequently, the ALJ's finding that the Class Action Waiver section supports a violation of the Act is not supported by law or fact and must be reversed, and the Board should grant the Employer's Exception Numbers 1 to 12 and 15.

(c) The Exemption's Placement, Font and Section Heading Do Not Diminish Its Efficacy.

The ALJ found the exemption insufficient, in part, because it appeared at the end of the ADR Policy under the "Severability" heading and was not highlighted by a more appropriate heading or capitalized or italicized font. (ALJD, 5:13-18, 6:4-10). Although such unequivocal exclusionary language should be sufficient no matter where it is placed, its placement at the end of the policy is not only conspicuous and appropriate, but arguably the most conspicuous and appropriate placement because it leaves no reasonable doubt whether any proceeding provision applies to the filing of Board charges. Moreover, to find, as the ALJ did, that the lack of emphasizing font, a more salient heading, or placement earlier in the policy renders the exemption ambiguous unreasonably presumes employees will not read the entire policy, or will only read the provisions set apart by a conspicuous font or heading. It is worth noting that the isolated phrases the ALJ erroneously relied on to find a violation (i.e., Covered Disputes and Class Action Waiver sections) were no more conspicuous or emphasized than the express exemption for Board charges. It simply defies logic to presume an employee would read one and feel restricted but not read and understand the more direct and explicit exemption. A reasonable interpretation simply cannot be based on such an outlandish presupposition.

Indeed, employees are routinely subject to voluminous collective bargaining agreements and benefit plan documents "where particular employee rights or obligations turn on the meaning of a single clause, phrase, or word," but are nevertheless bound by those inconspicuous provisions. *GameStop Corp.*, 363 NLRB No. 89, slip op. at 5 (Member Miscimarra concurring in part and dissenting in part). There is no principled basis to distinguish those binding obligations from the ones set forth in the much more concise and comprehensible ADR Policy.

Consequently, the ALJ's findings that the exemption's placement, font and section heading support a violation of the Act is not supported by law or fact and must be reversed, and the Board should grant the Employer's Exception Numbers 1 to 12 and 15.

3. The Policy's Other Provisions Emphasize That Its Does Not Apply To Claims With Administrative Agencies Like The Board.

The Policy does not solely rely on the explicit exemption of NLRB filings to elucidate its scope, although this unambiguous exclusion is unquestionably sufficient on its own. Rather, the Policy repeatedly emphasizes that it is intended to avoid the problems inherent in traditional court litigation, not to preclude charges filed with administrative agencies. The ALJ errantly failed to properly consider these sections.

(a) Several Provisions Make Clear The Policy Does Not Apply To Charges Filed With Administrative Agencies.

First, the Policy begins by clearly stating its purpose:

> Traditional [formal resolution of employment disputes] has been conducted through our court system. However, ***our court system too often has proven to be an exceedingly costly and time consuming process***, thus failing to provide the parties involved with an acceptable resolution of the dispute…We believe that the procedures set forth in this ADR Policy will result in a fair and equitable means for resolving those types of employment disputes that all too often become unnecessarily protracted.
>
> ***With this in mind***, your employer has developed and implemented this Alternative Dispute Resolution Policy ("ADR Policy").

Jt. Ex. 7, Amended Complaint, Ex. A, p. 1 (emphasis added). This introductory language would certainly color an employee's reasonable reading of the provisions that follow and would reasonably lead them to interpret the subsequent provisions as a restriction on traditional court litigation, not Board filings.

Second, the "Who is Covered by the ADR Policy" section states, "This agreement is a waiver of all rights to a ***civil court action*** for a covered dispute; only an arbitrator, ***not a Judge or Jury***, will decide the dispute." Jt. Ex. 7, Amended Complaint, Ex. A, p. 1. This explicit waiver only abdicates the right to pursue a "civil court action" before a civil court judge or jury. The waiver's conspicuous omission of other forums in which employment-related disputes may be adjudicated conveys that the ADR Policy does not waive or otherwise impact an employee's right to pursue claims in forums other than civil court.

Third, when defining "Covered Claims," the Policy states, "Claims of unlawful harassment, discrimination, retaliation or wrongful termination that ***cannot be resolved by the parties or during an investigation by an administrative agency***..." Jt. Ex. 7, Amended Complaint, Ex. A, p. 1 (emphasis added). Likewise, the paragraph excluding Board charges from the purview of the Policy states only a "claim that cannot be resolved through administrative proceedings shall be subject to the procedures of this ADR Policy." Jt. Ex. 7, Amended Complaint, Ex. A, p. 3. By specifying that only claims not amenable to resolution by an administrative agency are subject to the Policy's mandates, the Policy necessarily excludes claims that are amenable to resolution by administrative agencies, like Board charges, from the "Covered Claims." The "Covered Claims" section ends by explaining what will happen if an employee files "***a lawsuit in court***" that alleges both arbitral and non-arbitral claims. Jt. Ex. 7, Amended Complaint, Ex. A, p. 2 (emphasis added). Importantly, this section conspicuously and purposefully omits any mention of Board filings, which further emphasizes that covered claims only encompass arbitral claims raised in a lawsuit in state or federal court, not Board charges and other administrative agency charges.

Thus, adopting a meaningful contextual construction, the Policy clearly and unequivocally immunizes unfair labor practice charges filed with the Board from its arbitration mandate. Any employee who understands basic English and reads the entire Policy could not possibly, much less reasonably, interpret the ADR Policy as a prohibition on filing unfair labor practice charges with the Board when the plain and unambiguous provisions of the Policy state the exact opposite.

Consequently, the ALJ failed to properly consider the impact of these sections on the reasonable interpretation of the ADR Policy, and the Board should grant the Employer's Exceptions Numbers 1 to 12 and 15.

4. Prior Decisions Finding Arbitrations Agreements With Unqualified, Plain-English Exemptions For Board Charges Should Be Overturned.

Prior Board decisions deeming arbitration agreements that categorically exempt Board charges from their mandates in plain, easily understood English should be overturned because

these decisions rely on an untenable construction that contravenes well-established interpretative principles. *See, e.g., Lincoln Eastern*, 364 NLRB No. 16, slip op. at 2-3; *Bloomingdale's, Inc.*, 363 NLRB No. 172, slip op. at 4-6; *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 3-5; *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4-6. Agreements that expressly exempt the filing of Board charges cannot reasonably be interpreted to preclude the filing of such charges. Indeed, it would be patently *unreasonable* for an employee to interpret the ADR Policy as prohibiting the filing of Board charges when the Policy says the exact opposite. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1020 (2015); *see also Lincoln Eastern*, 364 NLRB No. 16, slip op. at 6 (Member Miscimarra dissenting). Accordingly, such policies should be considered lawful Category 1 policies under *Boeing*. As such, the Respondent respectfully requests the Board grant its Exceptions Numbers 1 to 12 and 15 and reverse the ALJ's Decision and Order.

5. The ADR Policy Is Readily Distinguishable From The Precedent Relied Upon By The ALJ.

The ALJ erroneously analogized the ADR Policy to the policies deemed unlawful in *Lincoln Eastern* and *SolarCity*. However, in addition to these decisions relying on *Lutheran Heritage* and being effectively overruled by *Boeing*, there are material distinctions between the ADR Policy and the policies in those cases that render *Lincoln Eastern* and *SolarCity* inapposite. In *Lincoln Eastern*, the exemption was buried in the middle of a long paragraph replete with legalese that repeatedly reiterated the policy "broadly cover[ed] the entire [employment relationship]" and concluded with a statement that all disputes must ultimately be resolved through arbitration, which the Board found would lead employees to believe filing Board charges is "futile" because any such charge must ultimately be adjudicated through arbitration. *Lincoln Eastern Management Corp.*, 364 NLRB No. 16, slip op. at 3 (2016). The exemption here, however, is drafted in plain, easily understood English and appears in a standalone paragraph which begins "***Nothing*** in this Alternative Dispute Policy prevents" thereby signaling to the reader that what follows is a categorical exclusion from the Policy's arbitration mandate. Thus, unlike *Lincoln Eastern*, nothing in the exemption could reasonably confuse employees about its scope or otherwise imply Board charges must ultimately be resolved through arbitration.

Similarly, the exemption in *SolarCity* permitted employees to file "claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer related laws, but only if, and to the extent applicable law permits… notwithstanding the existence of an agreement to arbitrate." 363 NLRB No. 83, slip op. at 4. The Board opined that employees would need "'specialized legal knowledge' to determine whether the right to file Board charges is permitted or precluded by these caveats." *Id.*, slip op. at 5. Unlike *SolarCity*, the exemption here does not contain any confusing language that necessitates specialized legal knowledge to understand, nor is it qualified in any way. It is a straightforward, categorical exemption drafted in language easily understood by even the most unsophisticated employee.

Indeed, the ADR Policy shares none of the hallmark traits which, under the now defunct standards, led the Board to conclude many of the purported exclusions it has previously considered were inadequate. Specifically, unlike the policies in other cases considered by the Board, the exclusion here is not drafted in language only employees with specialized legal knowledge could understand, and it is not buried among sentences replete with legalese or multiple broad mandates requiring the arbitration of all employment disputes. *See*, *e.g.*, *Ralph's Grocery Company*, 363 NLRB No. 128, slip op. at 2 (2016) (language excluding Board charges insufficient where it appears "halfway through six pages of fine print in a paragraph written for attorneys, not lay people," other language in the same paragraph reiterates that arbitration is "sole and exclusive remedy" for all employment disputes, and a disclaimer that the policy applies to all claims before any court or agency appears in bold, underlined font on the front page); *Bloomingdale's, Inc.*, 363 NLRB No. 172, slip op. at 5 (2016) (exclusion of NLRB claims appeared halfway through a 17-page document drafted in complicated legalese that repeatedly emphasized on multiple pages preceding the exclusion that "'all employment-related legal disputes' must be resolved by arbitration, including those arising under 'federal' law").

Nor is there any language in the same paragraph as the exclusion that would reasonably confuse employees as to the scope of the exclusion or would otherwise reasonably convey that the right to file Board charges is illusory or futile. *Ralph's Grocery Company*, 363 NLRB No. 128, slip. op. at 2 (2016) (finding language preserving the right to file Board charges insufficient

where it appeared "in the same paragraph as language "dictat[ing] that the dispute must nonetheless be resolved through arbitration…not through the Board," thereby rendering the right to file Board charges illusory).

In stark contrast to the claimed exclusions in those cases, the exclusion here is an absolute and unqualified exemption for Board charges drafted in plain, easily understood English that strategically appears in a paragraph dedicated solely to delineating the types of actions not subject to the Policy. Indeed, the only other sentence in the paragraph reiterates that only claims not resolvable by Board proceedings are subject to the Policy's mandates.

Consequently, Respondent respectfully requests the Board grant its Exceptions Numbers 1 to 12 and 15 and reverse the ALJ's Decision and Order.

D. The Business Justifications For The ADR Policy Significantly Outweigh Its Potential Impact On Protected Activity.[5]

Even assuming the ADR Policy could be reasonably interpreted to preclude employees from filing Board charges, a construction plainly belied by the Policy's unambiguous language, the business justifications for the ADR Policy far outweigh any potential impact the Policy may have on protected activity.

As detailed above, the ADR Policy expressly excludes the filing of Board charges from its purview and repeatedly emphasizes throughout that it does not apply to claims filed with administrative agencies or amenable to resolution through administrative investigations. Indeed, given the plain English language of the exclusion, its conspicuous placement within the policy, and the multitude of other provisions reinforcing the exemption of Board charges, an employee would literally have to *not* read the policy to interpret it as a prohibition on filing Board charges. Thus, the likelihood that the Policy would impact protected activity is minimal, at best.

By contrast, the ADR Policy's business justifications are substantial and have immediate and considerable relevance to employers and employees alike. Employment disputes are a usual, and arguably almost inevitable, occurrence. Litigating employment disputes in a traditional

[5] As noted above, the Respondent was prevented from putting in a full post-*Boeing* record of its business justifications, but those present in the ADR Policy itself justify reversal of the ALJ's Decision and Order. *See also*, footnotes 2 and 3.

lawsuit can prove crushingly expensive for businesses and can drain important business resources better deployed, and often critically needed, elsewhere. Traditional court lawsuits are unquestionably time-consuming, costly, and often unnecessarily protracted – intrinsic characteristics that are frequently exacerbated by factors beyond the parties' control. The impact of such litigation can have dire – and sometimes fatal – consequences for businesses. Similarly, the costs and delays of the court system equally impact employees and, as the adage goes, justice delayed is justice denied. These business justifications are articulated in the Policy itself.

Using arbitration as an alternative to traditional court litigation ensures both employers and employees obtain an expedient, cost-effect resolution of their disputes while simultaneously preserving a fair and equitable means for resolving those disputes before an impartial trier of fact. By expeditiously adjudicating employment disputes, arbitration relieves parties of the burdens and stress associated with prolonged court litigation without reducing the recovery available to an aggrieved party. This benefits the employer, who avoids exuberant costs and deprivation of critical business resources that can have devastating consequences on the business, and equally benefits the employee, who not only saves money but, perhaps more importantly, obtains the appropriate, and often critically needed, relief much quicker than a court case can usually deliver. Thus, the important business justifications for the ADR Policy clearly outweigh its minimal potential impact on protected rights, and the Amended Complaint must be dismissed.

Moreover, in the unlikely event an employee read the ADR Policy as requiring him or her to take an alleged violation of the Act to arbitration,[6] the impact would be slight as the arbitrator (or arbitration service) could easily and quickly refer the employee to the Board, or if the employee desired, could adjudicate and quickly resolve the employee's issue. *See Ralph's Grocery Company*, 363 NLRB No. 128, slip op. at 6 (Member Miscimarra dissenting in part) ("[T]he Supreme Court has broadly held that parties may lawfully agree to arbitrate statutory claims, and the Board for decades has held that NLRA claims may lawfully be resolved in

[6] Inevitably, by the time an employee got to this stage, he or she would have an attorney who would certainly be able to read the Policy to understand that it did not apply to NLRB or other agency charges or complaints.

arbitration..."); *see also Ralph's Grocery Company*, 363 NLRB No. 128, slip op. at 6-7, fn. 13 (Member Miscimarra dissenting in part) ("[B]y providing that the Board's power to prevent unfair labor practices 'shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement*, law, or otherwise' (emphasis added), Section 10(a) of the Act confirms that Congress contemplated parties may enter into private agreements to resolve unfair labor practice disputes – and nothing in Section 10(a) suggests that such "agreements" are limited to agreements between employers and unions."); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) (holding that a collective bargaining agreement can lawfully provide for the arbitration of statutory claims, and "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.")

In sum, the ADR policy furthers weighty interests acutely relevant to both employers and employees by ensuring that employment disputes are fairly and expeditiously resolved while avoiding the burdens of traditional state or federal court litigation. The potential impact on protected activity, on the other hand, is minimal as the Policy's plain language expressly excludes Board charges from its mandates, and the Policy repeatedly reiterates that it aims to circumvent the "exceedingly costly and time consuming process" of litigating employment disputes in state or federal court, not to restrain charges filed with administrative agencies like the Board. Accordingly, the Policy's business justifications greatly outweigh its potential impact on protected activity, and it does not violate the Act.

Consequently, the Respondent respectfully requests the Board grant its Exceptions Numbers 13 to 15 and reverse the ALJ's Decision and Order.

E. The ALJ Failed To Conduct The Balancing Test Mandated Under *Boeing*.

The ALJ utterly failed to conduct the balancing test mandated by *Boeing*, erroneously concluding that "while the benefits of arbitrating disputes are generally well recognized…there is insufficient basis in current law and precedent to conclude that this justification is sufficient to outweigh" the potential impact on protected rights. (ALJD, 7:8-14). However, the *Boeing* balancing test is a fact-specific inquiry that depends on the evidence presented in each individual

case, not general legal principles articulated in Board precedent. Accordingly, the ALJ should have weighed the potential impact on protected rights against the legitimate business justifications for the ADR Policy and rendered a finding as to whether the justifications outweighed the potential intrusion on protected rights.

The ALJ also failed to consider the "nature and extent" of the potential impact on protected rights. (ALJD, 6:39-7:13). Although the ALJ concluded the right to file Board charges is "central to the federal nationwide labor policy," he failed to consider the degree of the potential intrusion on that right given the Policy's express exemption for Board charges. *Id.* Here, the explicit exclusion for Board charges demonstrates that the ADR Policy is not intended to chill employees' protected rights, and in fact goes to great lengths to avoid such an impact.

Consequently, the Respondent respectfully requests the Board grant its Exceptions Numbers 13 to 15 and reverse the ALJ's Decision and Order.

F. The ALJ Erred In Not Reopening The Record.

As noted above, Respondent requested that the ALJ reopen the record to receive evidence relevant to the *Boeing* standard, but the ALJ neither considered nor addressed this request. An ALJ may order the record reopened when extraordinary circumstances justify such action. Board's Rules and Regulations, § 102.35(a)(8); *see also* §102.48. The parties agreed to submit this case on a stipulated record on November 29, 2017, before the Board enunciated the new, retroactively applicable standard for evaluating facially neutral policies in *Boeing*. Under the new *Boeing* standard, the Board, and the ALJ, must consider facts not previously relevant to the "reasonably construe" standard applied in *U-Haul*, including the nature and extent of the potential impact on protected rights and the business justifications underlying the policy. *Boeing*, 365 NLRB No. 154, slip. op. at 15. In *Boeing*, the Board stated:

> Parties may also introduce evidence regarding a particular rule's impact on protected rights or the work-related justifications for the rule. The Board may also draw reasonable distinctions between or among different industries and work settings. We may also take into consideration particular events that may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights.

Id.

These new considerations implicate evidence not previously relevant under *Lutheran Heritage*. The parties could not possibly have gleaned the need to provide evidence relevant to such considerations when they agreed to submit the case on a stipulated record. In this regard, absent reversal of the ALJ's Decision and Order and dismissal of the Amended Complaint, the Employer expressly requested the record be reopened so that appropriate evidence of potential impact and business justifications could be presented. (RBM, p. 15, § C). Remarkably, not only did the ALJ not grant the request, he failed to even address it. Accordingly, should the Board find the record evidence insufficient to reverse the ALJ's Decision and Order and order the ALJ to dismiss the Amended Complaint, Respondent respectfully requests that the Board grant Respondent's Exception Numbers 15 to 16 and order the ALJ to reopen the record to receive evidence relevant to the new standard articulated in *Boeing*.

V. CONCLUSION.

For the reasons detailed above, the Board should not adopt the ALJ's decision and should instead dismiss the allegations in the Amended Complaint.

DATED: March 14, 2018

EPSTEIN BECKER & GREEN, P.C.

By: _____
Adam C. Abrahms
Christina C. Rentz
ATTORNEYS FOR SAN RAFAEL HEALTHCARE WELLNESS, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067-2506.

3. I served copies of the following documents (specify the title of each document served):

RESPONDENT'S BRIEF SUPPORTING EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

Counsel for the NLRB

Joseph D. Richardson
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California, 94103
Fax: (415) 356-5156
Email: joseph.richardson@nlrb.gov

Counsel for Charging Party

Florice Hoffman, Esq. Date
Law Office of Florice Hoffman
8502 E Chapman Avenue Suite 353
Orange, CA 92869-2461
Fax: (714) 282-7918
Email: fhoffman@socal.rr.com

5. a. ☒ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and placed the envelope for collection and mailing on the date shown below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

b. ☐ **By overnight delivery.** I enclosed the documents on the date shown below in an envelope or package provided by an overnight delivery carrier and addressed to the person at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

c. ☐ **By e-mail or electronic transmission.** I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.

6. I served the documents by the means described in item 5 on March 14, 2018.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

March 14, 2018 — DATE
Lynne Conner — (TYPE OR PRINT NAME)
(SIGNATURE OF DECLARANT)